

STATE OF MICHIGAN
COURT OF APPEALS

MARIAN JENKINS,

Plaintiff-Appellant/Cross-Appellee,

and

LAWRENCE P. HANSON,

Appellant/Cross-Appellee,

v

JAMES F. ALTMAN and NATIVITY CENTER,
INC.,

Defendants-Appellees/Cross-
Appellants.

UNPUBLISHED

May 31, 2005

No. 256144

Chippewa Circuit Court

LC No. 01-005752-CB

Before: Murray, P.J., and O'Connell and Donofrio, JJ.

PER CURIAM.

Plaintiff Marian Jenkins and her attorney, Lawrence P. Hanson (collectively referred to as “appellants”), appeal as of right, and defendants cross appeal, from the trial court’s postjudgment order awarding defendants attorney fees and costs. We affirm in part and reverse in part.

This case arises out of a November 2, 1999, transaction in which plaintiff transferred 1,100 shares of common stock in AFLAC, Inc., to an account for defendant Nativity Center, Inc., a nonprofit corporation for which both plaintiff and defendant James F. Altman served on the board of directors. In August 2001, plaintiff filed the instant action against Altman and Nativity Center, seeking return of the AFLAC stock or its monetary value. The trial court twice granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(8), but in both instances permitted plaintiff to file an amended complaint.

In November 2002, the trial court denied defendants’ motion for summary disposition with regard to plaintiff’s second amended complaint, concluding that the complaint sufficiently stated a cause of action and that genuine issues of material fact existed. Defendants moved for reconsideration of the trial court’s order. In August 2003, defendants withdrew their motion for reconsideration and filed a delayed application for leave to appeal to this Court from the November 2002 order denying summary disposition. In lieu of granting the application, this

Court reversed the November 2002 order and remanded the case to the trial court for entry of an order of summary disposition in favor of defendants. Additionally, this Court held that the trial court abused its discretion by sua sponte allowing plaintiff to file the second amended complaint after her first amended complaint failed to state a claim, allowing plaintiff to file an untimely and futile second amended complaint, and by not timely considering defendants' motion for reconsideration. *Jenkins v Altman*, unpublished order of the Court of Appeals, entered February 11, 2004 (Docket No. 250298).

On remand, in an order dated April 16, 2004, the trial court granted summary disposition to defendants. Subsequently, in an order dated May 29, 2004, the trial court partially granted defendants' motion for costs and attorney fees. The court directed plaintiff's attorney, Hanson, to pay \$2,456 for attorney fees and costs incurred by Nativity Center in responding to his attempt to obtain a default and default judgment, and in responding to his filing of a third amended complaint without leave of the court. In addition, the court also ordered plaintiff to pay \$558.44 for transcripts and other costs under the "prevailing party" rule, MCR 2.625.

Appellants first argue that the trial court erred by awarding defendants attorney fees and costs incurred in defendants' earlier appeal to this Court. Appellants' argument on appeal is limited to the contention that the trial court erred in awarding defendants the costs for the preparation of transcripts in the prior appeal. Because a party may not leave it to this Court to search for a factual basis to sustain or reject a position, *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990), or give an issue only cursory treatment on appeal, *Peterson Novelty, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003), we limit our consideration to the transcript costs.

Because the power to tax costs is wholly statutory, we review de novo the trial court's decision to award \$438.44 for the transcript costs associated with defendant's earlier appeal. *Haliw v Sterling Heights*, 471 Mich 700, 704; 691 NW2d 753 (2005); *J C Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 429; 552 NW2d 466 (1996). We agree that the trial court was not authorized to tax costs for the transcripts. Transcripts are taxable costs in an appeal. MCL 600.2543 and MCR 7.219(F)(3). But consistent with *DeWald v Isola (After Remand)*, 188 Mich App 697, 703; 470 NW2d 505 (1991), we conclude that it is inappropriate to expand the scope of MCR 2.625 to include the cost of transcripts prepared for an appeal as costs recoverable by the prevailing party for a civil action. Hence, we vacate the trial court's award of \$438.44 for the transcripts.

Appellants next argue that the trial court erred by awarding attorney fees to Nativity Center because Nativity Center was represented by Altman, a pro se litigant, and Altman did not offer proof that he was actually paid for his services. We disagree. Because the trial court's decision reflects that it relied on MCR 2.114(E) when ordering Hanson to pay \$2,376 in attorney fees, we consider this issue under the "appropriate sanction" language of this court rule. Under MCR 2.114(E), the trial court was authorized to order Hanson to pay defendants' reasonable expenses incurred in connection with Hanson's filing of the default, default judgment, and third amended complaint documents, including reasonable attorney fees.

We review de novo a trial court's application and interpretation of a court rule, *Haliw*, *supra* at 704, but its determination of the amount of reasonable attorney fees is reviewed for an

abuse of discretion. *In re Costs & Attorney Fees*, 250 Mich App 89, 104; 645 NW2d 697 (2002); *In re Attorney Fees & Costs*, 233 Mich App 694, 704-705; 593 NW2d 589 (1999).

We conclude that the trial court correctly applied MCR 2.114(E). Although Altman was not entitled to attorney fees for his self-representation, *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 726; 591 NW2d 676 (1998), the trial court did not abuse its discretion in determining how much of Altman's claimed expenses should be allocated to Nativity Center. It was not necessary that Altman establish that he was actually paid by Nativity Center. The existence of an attorney-client relationship is the basis of an attorney's right to recover compensation for his services. *Macomb Co Taxpayers Ass'n v L'Anse Creuse Public Schools*, 455 Mich 1, 12; 564 NW2d 457 (1997). "Whether the attorney, for any reason, opts not to pursue compensation, has nothing to do with the fact that legal services were incurred." *Id.* Therefore, we reject this claim of error.

Next, although appellants argue that the trial court erred in awarding sanctions against Hanson under MCR 2.114 for expenses incurred by defendants in responding to the third amended complaint, appellants have insufficiently briefed the factual and legal basis of their argument to properly invoke appellate review. *Peterson Novelties, Inc, supra* at 14; *Norman, supra* at 260. To the extent that appellants suggest that a litigant has a perpetual right to amend pleadings under MCR 2.118(A)(1), as responsive pleadings are served or become unnecessary, we disagree. Based on the plain language of the court rule, the rule clearly was not intended to allow a party to continue to amend his complaint as a matter of course.

Appellants next argue that the trial court should not have considered defendants' motion for attorney fees because defendants failed to comply with the specificity requirements in MCR 2.119(A), or the timeliness requirements in MCR 2.119(C). We conclude that appellants have not established any procedural deficiency warranting appellate relief. It is clear from the record that the parties understood that defendants were seeking sanctions under MCR 2.114 and MCL 600.2591. Also, the trial court appropriately held an evidentiary hearing to address any objections to Altman's bill of costs and determine the reasonableness of the requested attorney fees. *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 488; 652 NW2d 503 (2002). Because appellants have not shown that they were prejudiced by any procedural deficiency, appellate relief is not warranted with respect to this issue. MCR 2.613(A); cf. *Heugel v Heugel*, 237 Mich App 471, 483-484; 603 NW2d 121 (1999); *Baker v DEC Int'l*, 218 Mich App 248, 262; 553 NW2d 667 (1996), rev'd in part on other grounds 458 Mich 247 (1998).

Appellants next argue that the successor judge erred in reversing the predecessor judge's March 20, 2003, order requiring that Altman pay \$660. We conclude that this issue is not properly before this Court because appellants did not appeal the April 16, 2004, order of summary disposition in which the successor judge vacated the earlier March 20, 2003, order as moot. MCR 7.204(A). Rather, appellants filed the instant appeal from the trial court's May 29, 2004, postjudgment order awarding attorney fees and costs, see MCR 7.202(6)(a)(iv), which appeal is limited to the portion of the order with respect to which there is an appeal by right, i.e., the May 29, 2004, order. MCR 7.203(A)(1). "The question of jurisdiction is always within the scope of this Court's review." *Walsh v Taylor*, 263 Mich App 618, 622; 689 NW2d 506 (2004); and see MCR 7.216(A)(10). Because this Court's jurisdiction in this appeal is limited to the May 29, 2004, postjudgment order awarding attorney fees and costs, we decline to consider appellants' challenge to the April 16, 2004, order.

For their last issue, appellants suggest that they are entitled to “prevailing party costs for responding to defendant’s motion.” Because appellants do not address the merits of this issue, we deem it abandoned. “It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court.” *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). To the extent that appellants make a cursory argument regarding certain attorney fees or costs awarded to Nativity Center, we decline to address appellants’ claim because it is not set forth in the statement of this issue and is given only cursory treatment. MCR 7.212(C)(5); *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995); see also *Peterson Novelties, Inc*, *supra* at 14.

In their cross appeal, defendants first argue that the trial court erred in failing to grant their motion to strike appellants’ response to their motion for sanctions on the ground that it was untimely and improperly served under MCR 2.119(C) and MCR 2.107(C). Defendants have not established that they were prejudiced by any technical noncompliance with the court rules; therefore, we find no basis for appellate relief. MCR 2.613(A); *Heugel*, *supra* at 483-484; *Baker*, *supra* at 262; see also *Hubka v Pennfield Twp*, 197 Mich App 117, 119; 494 NW2d 800 (1992), *rev’d in part on other grounds* 443 Mich 864 (1993).

Next, defendants argue that the trial court erred by denying their request for all costs and attorney fees on the ground that the entire litigation was frivolous, given that plaintiff’s original complaint and first amended complaint were both dismissed for failure to state a claim. We disagree.

The amount awardable under MCL 600.2591 for a frivolous claim presents a distinct question from whether a claim is frivolous. We review a trial court’s finding regarding whether an action was frivolous for clear error. *Jerico Construction, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003). To determine if sanctions are appropriate under MCL 600.2591, the plaintiff’s claim must be evaluated at the time the lawsuit was filed. *In re Attorney Fees & Costs*, *supra* at 702. The mere fact that summary disposition is granted under MCR 2.116(C)(8) does not require a finding that the claim was frivolous. See *LaRose Market, Inc v Sylvan Center, Inc*, 209 Mich App 201; 530 NW2d 505 (1995). Nor does the mere fact that a plaintiff does not prevail render a complaint frivolous. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002). “The statutory scheme is designed to sanction attorneys and litigants who file lawsuits or defenses without reasonable inquiry into the factual basis of a claim or defense, not to discipline those whose cases are complex or face an ‘uphill fight.’” *Louya v William Beaumont Hosp*, 190 Mich App 151, 163-164; 475 NW2d 434 (1991).

Although it is apparent in this case that plaintiff faced an uphill fight, we are not persuaded that the trial court clearly erred in finding that plaintiff’s original and first amended complaints were not frivolous within the meaning of MCL 600.2591. *Jerico Construction, Inc*, *supra*. Likewise, to the extent that defendants suggest that sanctions were warranted under MCR 2.114(E) with respect to the original and first amended complaints, we conclude that defendants have not established that the trial court clearly erred in finding no basis for sanctions. *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997).

Nor are we persuaded that the trial court clearly erred in rejecting defendants’ request for sanctions with respect to the second amended complaint on the ground that it was not timely filed. Although this Court’s holding in Docket No. 250298 that the predecessor judge abused his

discretion by allowing plaintiff to file an untimely and futile second amended complaint is binding as the law of the case, *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000), this Court did not decide that the second amended complaint was frivolous. Defendants' mere assertion that an untimely filing is "frivolous" and, hence, vexatious, is insufficient to demonstrate entitlement to relief with respect to this matter. "The appellant may not merely announce his position and leave it to this Court to discover and the basis for his claims, . . . nor may he give issues cursory treatment with little or no citation of supporting authority." *Peterson Novelties, Inc, supra* at 14.

Similarly, defendants have not identified any support for their claim that they were entitled to one hundred percent of their requested attorney fees. *Id.* In any event, as we have already indicated, Altman was not entitled to attorney fees for his self-representation. *FMB-First Michigan Bank, supra* at 726. Further, defendants' argument fails to present any basis for concluding that the trial court abused its discretion in determining the amount of Altman's expenses that should be allocated to Nativity Center, for purposes of the sanctions imposed on Hanson under MCR 2.114(E). *In re Attorney Fees & Costs, supra* at 704-705.

Affirmed in part and reversed in part. No costs under MCR 7.219(A), neither party having prevailed in full.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Pat M. Donofrio